Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

JAIME A. FARRALES, MARK J. FARRALES, ANN J. FARRALES, AND JANE NENA J. FARRALES,

Petitioners,

v.

ALBERTO GONZALES, ATTORNEY GENERAL; MICHAEL CHERTOFF, SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY; AND THE UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES,

Respondents.

On Petition for a Re-Hearing En Banc to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

JAIME A. FARRALES
MARK J. FARRALES
ANN J. FARRALES
JANE NENA J. FARRALES
Petitioners Pro Se

3350 Wilshire Blvd, Ste. 855
Los Angeles, CA 90010
(213) 738-7004

QUESTIONS PRESENTED

1. Whether the U.S. Court of Appeals for the Ninth Circuit's decision in *Friend v. Reno,* 172 F.3d 638 (9th Cir. 1999) has preferential application over the specific, unambiguous and mandatory provisions of Sections 201(e) and 205 of the 1940 Nationality Act in determining the citizenship of children born to American parentage in the outlying possessions of the United States prior to 1940.

2. Whether the case law of *Friend v. Reno* is defective and invalid, given that it directly contradicts the contemporaneous interpretation of Rev. Stat. Section 1993 by the Departments of State, Labor, and Justice; given that it conflicts with other historical records; and given that it ignores the controlling provisions of Sections 201(e) and 205 of the 1940 Nationality Act.

3. Whether government respondents are liable for damages under the "non-discretionary function" exception to 28 U.S.C. Section 1346(b)(1) if they refuse to carry out a mandatory policy established in Sections 201(e) and 205 of the 1940 Nationality Act.

4. Whether a damage suit is permissible for intentional insidious discrimination against government respondents for using, as a matter of policy, the decision in *Friend v. Reno* in order to deny all citizenship applications based upon Sections 201(e) and 205 of the 1940 Nationality Act.

5. Whether petitioners' rights to equal protection, and substantive and procedural due process, were violated by the district court and U.S. Court of Appeals when their claims were summarily dismissed, without affording petitioners the benefit of a full-blown determination of the issues.

PARTIES TO THE PROCEEDING

Petitioners are Jaime A. Farrales, Mark J. Farrales, Ann J. Farrales, and Jane Nena J. Farrales.

Respondents are Alberto Gonzales, in his capacity as Attorney General; Michael Chertoff, in his capacity as Secretary of the Department of Homeland Security; and the United States Citizenship and Immigration Services. Respondents have been consistently impleaded as parties since the filing of the action with the U.S. District Court, Ninth Circuit.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Jaime A. F[illegible]les, Mark J. Farrales, Ann J. Farrales, and Jane Nena J. [illegible]ales respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The summary order denying the petition for rehearing and rehearing en banc (App., *infra,* 1a-2a) is unreported. The memorandum of the court of appeals summarily affirming the decision of the district court (App., *infra,* 3a-4a) is unreported. The opinion of the district court, which was incorporated in the orders granting respondents' motions for dismissal (App., *infra,* 5a-15a) are also unreported.

JURISDICTION

The court of appeals' order summarily affirming the orders of the district court was entered on December 1, 2005. A timely petition for rehearing and for rehearing *en banc* was denied and entered on April 4, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL and STATUTORY PROVISIONS INVOLVED

1. The Supremacy Clause of the United States Constitution provides in relevant part: "[T]he Laws of the United States...shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding." U.S. Const. art. VI, Paragraph 2

2. The Fifth Amendment to the United States Constitution provides in relevant part that no person shall "be deprived of life, liberty, or property, without due process of law."

3. Section 201(e) of the 1940 Nationality Act declares the following person to be a citizen of the United States: "A person born in an outlying possession of the United States of parents one of whom is a citizen of the United States who had resided in the United States or one of the outlying possessions prior to the birth of such person"

4. Section 205 of the 1940 Nationality Act declares that Section 201(e) is applicable to children born before or after the passage of that act: "The provisions of section 201, subsections (c), (d), (e), and (g) and section 204, subsections (a) and (b), hereof apply, as of the date of birth, to a child born out of wedlock, provided the paternity is established during minority, by legitimation, or adjudication of a competent court. In the absence of such legitimation or adjudication, the child, whether born before or after the effective date of this Act, if the mother had the nationality of the United States at the time of the child's birth, and had previously resided in the United States or one of its outlying possessions, shall be held to have acquired at birth her nationality status."

5. Section 201(g) of the 1940 Nationality Act declares the following person to be a citizen of the United States: "A person born outside the United States and its outlying possessions of parents one of whom is a citizen of the United States who, prior to the birth of such person, has had ten years' residence in the United States or one of its outlying possessions, at least five years of which were after attaining the age of sixteen years, the other being an alien: *Provided*, That, in order to retain such citizenship, the child must reside in the United States or its outlying possessions for a period or periods totaling five years between the ages of thirteen and twenty-one years: *Provided further*, That, if the child has not taken up a residence in the United States or its outlying possessions by the time he reaches

the age of sixteen years, or if he resides abroad for such a time that it becomes impossible for him to complete five years' residence in the United States or its outlying possessions before reaching the age of twenty-one years, his American citizenship shall thereupon cease."

6. Section 103 of the Immigration and Nationality Technical Corrections Act (INTCA) of 1994 reaffirms the citizenship of children who did not meet the retention requirement under Section 201(g): "A person who was a citizen of the United States at birth and lost such citizenship for failure to meet the physical presence retention requirements under section 301(b) (as in effect before October 10, 1978), shall, from and after taking the oath of allegiance required by section 337 be a citizen of the United States and have the status of a citizen of the United States by birth, without filing an application for naturalization..."

7. Section 1993 of the Revised Statutes of 1878 provides that: "All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States."

STATEMENT

This case raises important questions relating to derivative citizenship; the retroactive scope of Section 201(e) of the 1940 Nationality Act; the validity of the Ninth Circuit's decision in *Friend v. Reno*, 172 F.3d 638 (1999); and the executive's and judiciary's (Ninth Circuit's) efforts to supplant the unambiguously worded provisions of Nationality Act Sections 201(e) and 205 with the *Friend* decision's erroneous interpretation of Revised Statutes Section 1993.

The primary question presented is whether respondents and the Ninth Circuit courts, in considering the citizenship of a child born to American parentage in the outlying possessions of the United States prior to 1940, have the authority to completely disregard unambiguous and mandatory provisions of law, specifically Sections 201(e) and 205 of the 1940 Nationality Act.

A. On Laws Pertaining to Derivative Citizenship

While the Fourteenth Amendment to the Constitution provides for the citizenship of all children born within the United States (*jus soli*), the Constitution itself does not explicitly provide for the citizenship of children born outside the United States whose parents are citizens. To take care of these children, and to allow for the transmission of citizenship from parent to child (*jus sanguinis*), Congress enacted Section 1993 of the Revised Statutes of 1878. This law provided for the citizenship of children born outside the limits and jurisdiction of the United States, provided that the citizen parent had resided in the United States prior to the birth of the child.

Problems relating to the statutory transmission of citizenship surfaced, however, after the United States began acquiring outlying possessions. The most immediate concern related to whether the outlying possessions were considered to be "outside the limits and jurisdiction of the United States" or "within the limits and jurisdiction of the United States" with respect to the residency requirement of Rev. Stat. Section 1993.[1] One view held that these children were born outside the limits and jurisdiction of the United States according to Section 1993. According to this view, a citizen parent born in the outlying possessions would not be able to transmit citizenship to a child if he or she did not reside in the continental United States prior to the birth of the child. A second view, however,

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[1] It should be noted that the statutory transmission of citizenship in the outlying possessions is completely different from, and independent of, the Fourteenth Amendment. Citizenship by virtue of the Fourteenth Amendment *never* applied to the outlying possessions.

held and implemented by the Departments of State and Labor, considered an outlying possession "within the limits and jurisdiction of the United States" such that children born *to citizen parents* in those outlying possessions were citizens of the United States, *even if the citizen parents had not been in the United States proper before the birth of the child.*[2]

In 1940, the Nationality Act was passed "due to a conviction on the part of the officials of the Departments of State, Justice, and Labor that the old nationality laws of the United States, which were scattered among about fifty statutes, were inadequate."[3] In particular, Section 201(e) of the 1940 Act was included to address the situation of children born to citizen parents in the outlying possessions. In the Congressional hearings on the passage of the 1940 Act, the official representatives from the Departments of State and Labor pointed out that children born under Section 201(e) of the proposed code were already considered citizens under Rev. Stat. Section 1993.[4] Moreover, Section 201(e) of the 1940 Act was made clearly and unambiguously retroactive by Section 205 of the same Act.

For close to sixty years, there were no cases involving the relationship between Rev. Stat. Section 1993 and Nationality Act Section 201(e). Neither were there any cases involving the retroactive scope of Section 201(e) (as provided in Section 205). However, the court of appeals for the Ninth Circuit, in *Friend v. Reno,* 172 F.3d 638 (9th Cir. 1999), ruled – in direct contradiction to Section 205 – that Section 201(e) was strictly prospective in its application. That court also declared that

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[2] Testimonies of Mr. Flournoy and Mr. Shoemaker, official representatives of the Departments of State and Labor, respectively, during the Congressional committee hearings on the passage of the 1940 Nationality Act. See pp. 40, 56 of *To Revise and Codify the Nationality Laws of the United States.* Hearings before the Committee on Immigration and Naturalization, House of Representatives (Washington: Govt. Printing Office, 1945).

[3] See pp. 4-6 of "The Nationality Act of 1940," by Richard W. Flournoy. *Contemporary Law Pamphlets,* Series 5, Number 4, International Law Series. New York: New York University School of Law, 1941.

[4] See *To Revise and Codify*...pp. 40, 56. See also "The Nationality Act of 1940"... pp. 4-6.

Section 201(e) liberalized the residency requirement for transmission of citizenship under Rev. Stat. Section 1993.

B. Petitioners' Application For Derivative Citizenship

Petitioners are a family who arrived in the United States in 1990 in search of political asylum. The asylum application was denied in 1998, and petitioners brought the case on appeal to the Board of Immigration Appeals. The BIA subsequently denied the appeal, and the case was brought on appeal to the court of appeals for the Ninth District. In 2003, a few months before the asylum appeal was finally dismissed, petitioner Jaime Farrales discovered that he was in fact entitled to derivative United States citizenship through the action of various nationality laws. Petitioner applied for a certificate of citizenship in May 2003 with respondent USCIS.

In his application for certificate of citizenship, petitioner Jaime Farrales provided the following succession of facts and applicable laws to be the bases for his claim to U.S. citizenship:

1. Petitioner's grandmother, Lily May McGuire was born in the Philippine Islands in 1902 to a citizen father (James McGuire) and a mother who was a national but not a citizen of the United States.[5] At the time of Lily's birth, the Philippine Islands were considered to be an outlying possession of the United States.

Petitioner argued that two different laws applied to Lily McGuire's birth, and that each of these laws sufficiently and separately provided for her citizenship. First, Lily McGuire was born a citizen under Section 201(e) of the 1940 Nationality Act, which was explicitly made retroactive by Section 205 of the same Act. According to Sections 201(e) and 205, Lily McGuire was a U.S. citizen because she was "born in an outlying possession of the United States of parents one of whom [was] a citizen...who had resided in the United States or one of the outlying possessions" prior to her birth. Second, Lily McGuire was also born a citizen under Rev.

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[5] James McGuire was a naturalized U.S. citizen who had resided in the United States prior to a military assignment in the Philippine Islands.

Stat. Section 1993 because she had a citizen parent who had resided in the United States prior to her birth.[6]

2. Petitioner's father, Ricardo McGuire Farrales, was born in the Philippine Islands in February 1925 to a U.S. citizen mother (Lily May McGuire) and a father who was a national but not a citizen of the United States. At the time of Ricardo's birth, the Philippines Islands were considered to be an outlying possession of the United States.

Petitioner argued that the same two laws that applied to his grandmother's citizenship also applied to his father Ricardo's citizenship at birth. Again, petitioner asserted that each of these laws separately and sufficiently provided for Ricardo's citizenship. First, Ricardo was a citizen according to Nationality Act Sections 201(e) and 205 because he was "born in an outlying possession of the United States of parents one of whom [was] a citizen...who had resided in the United States or one of the outlying possessions" prior to his birth. Second, Ricardo was also born a citizen under Rev. Stat. Section 1993 because he had a citizen parent who, by residing in an outlying possession of the United States, fulfilled the residency requirement within the purview and construction of that law.[7]

3. Petitioner Jaime Farrales was born in the Philippine Islands in April of 1947 to a U.S. citizen father (Ricardo McGuire Farrales) and a mother who was not a citizen. At the time of petitioner Jaime's birth, the Philippines Islands were already an independent country and no longer considered an outlying possession of the United States.[8]

Petitioner argued that he was born a U.S. citizen under Section 201(g) of the 1940 Nationality Act, and that he had the

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[6] Rev. Stat. Section 1993 originally required that the citizen parent be the father, but this was later corrected through an amendment in 1934 and then later through the retroactive application of section 101 of the Immigration and Nationality Technical Corrections Act (INTCA) of 1994. Both of these amendments allowed for transmission of citizenship through citizen mothers.

[7] Construction required, says Flournoy

[8] The Philippine Islands were granted independence on July 4, 1946. On that day the islands ceased to be an outlying possession of the United States, and all non-citizen nationals became aliens for the purposes of U.S. nationality and immigration laws.

right to reaffirm his citizenship under Section 103 of the Immigration and Nationality Technical Corrections Act (INTCA) of 1994. More specifically, petitioner argued for his citizenship under Section 201(g) because, at the time of his birth, he had a citizen father who had met the residency requirement for transmission of citizenship under Section 201(g).[9]

C. USCIS, District Court, and Court of Appeals Decisions

USCIS denied Jaime's application for certificate of citizenship. Petitioner then filed a timely appeal with the agency's Administrative Appeals Office (AAO), which was also denied. Both denials were based on the contention that Jaime's father, Ricardo, never acquired the U.S. citizenship of his mother Lily (petitioner's grandmother). However, neither decision responded to petitioner's claim that Nationality Act Sections 201(e) and 205 explicitly and unambiguously provided for the citizenship of his father. Rather, in discussing the citizenship of petitioner's father, both decisions focused exclusively on Rev. Stat. Section 1993. Both decisions concluded that according to Section 1993, petitioner's father, Ricardo, did not inherit his mother's U.S. citizenship because she did not reside "in the United States" prior to his birth.

After the AAO's denial, petitioners filed suit in the district court for the declaration of Jaime Farrales' citizenship under Nationality Act Section 201(g).[10] Petitioners alleged that jurisdiction for the judicial declaration of United States

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[9] Section 201(g) required the citizen parent to have had "ten years' residence in the United States or one of its outlying possessions, at least five years of which were after attaining the age of sixteen years." Petitioner's father met this residency requirement because he lived in the Philippine Islands for more than 21 years (from February 1925 to July 1946) prior to petitioner's birth in 1947. During this entire 21-year period, the Philippines were considered an outlying possession of the United States.

[10] Petitioners Mark and Ann Farrales joined the district court case because they were brought to the United States as minors by their U.S. citizen father, Jaime Farrales. Petitioner Jane Nena J. Farrales is Jaime Farrales' wife who would benefit from the declaration of his citizenship.

nationality, in the event of administrative denial of such right and privilege under 8 USCS, Section 1503, lied with the district court pursuant to the Immigration and Nationality Act (INA), Act 360, Section 360(a). Section 2201 of Title 28 authorizes that suit may be filed against the agency or department that denies the rights and privileges of a United States citizen.

On motion of respondents, the district court dismissed petitioners' case on March 14, 2005.[11] In its dismissal, the district court claimed that it lacked jurisdiction to entertain the case, and suggested that petitioners were only claiming citizenship as a result of the earlier denial of their asylum case.[12] Nevertheless, in the same order, the district court ruled that petitioner Jaime Farrales was not a citizen because his father did not inherit citizenship from his mother under Rev. Stat. Section 1993. The district court claimed that it was bound by the court of appeals' earlier decision in *Friend v. Reno*, which ruled that a U.S. citizen parent's residency in the outlying possessions prior to 1940 did not qualify for transmission of citizenship. The district court, however, did not respond to petitioners' claim that Nationality Act Sections 201(e) and 205 applied to the birth of petitioner Jaime's father.

Petitioners appealed the district court's dismissal to the court of appeals for the Ninth Circuit. Petitioners filed an opening brief, but respondents filed instead a motion to affirm the district court's order of dismissal. The court of appeals' panel (Wallace, Leavy and Berzon) granted respondents' motion on December 1, 2005 by way of a summary memorandum which held that, "A review of the record and the opening brief indicates that the questions raised in this appeal are so insubstantial as not to require further argument.

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[11] The district court dismissed an admitted Second Amended Petition. On the following day (March 15, 2006), the district court also dismissed a pending Third Amended Petition (App., *infra*, 5a-6a), which alleged additional abuses by respondent USCIS.

[12] In December of 2004, the district court issued an order denying petitioners' motion for preliminary injunction. Without examining the facts and bases for the claim of citizenship, the district court summarily held that the citizenship claim was "not likely to succeed," and that therefore preliminary injunction would not lie.

Accordingly, we grant appellees' motion for summary affirmance of the district court's judgment." In support of its decision, the court of appeals cited its earlier decision in *Friend v. Reno*.

Petitioners timely filed a petition for rehearing en banc, alleging, among others, that the refusal by USCIS and the district court to acknowledge the supremacy of Sections 201(e) and 205 triggered Constitutional questions regarding the separation of powers, and that the question of citizenship in this case could not be fairly resolved without careful consideration of these nationality laws.

The court of appeals for the Ninth Circuit denied the petition for rehearing en banc on April 4, 2006.

REASONS FOR GRANTING THE WRIT

The decisions below defy specific and unambiguously worded controlling laws, specifically Sections 201(e) and 205 of the 1940 Nationality Act. The Ninth Circuit courts' adherence to *Friend v. Reno* is also problematic because that decision is a clear example of judicial legislation: it contradicts and supplants specific provisions of law (Sections 201(e) and 205). The *Friend* decision conflicts with numerous decisions by this Court pronouncing Congress' exclusive and supreme authority in enacting retroactive statutes. The *Friend* decision also ignores relevant historical and legislative records. Finally, the court of appeals' summary dismissal sanctioned several other significant errors and abuses by the district court.

For the reasons enumerated above, review by this Court is warranted. Review of this case would also allow this Court to correct the anomalous and highly dangerous precedent set by the Ninth Circuit in *Friend*.

I. The Decisions Below Defy Unambiguous and Mandatory Laws

The court of appeals abused its powers when it ignored Sections 201(e) and 205 of the 1940 Nationality Act. These

laws served as the primary legal bases for petitioners' case against respondents, and are indispensable in resolving the question of derivative citizenship. By summarily affirming the district court's decision, which conspicuously omitted any discussion of these controlling laws, the court of appeals sanctioned a transgression upon Congress's authority to enact retroactive legislation.

A. The Ninth Circuit Courts Have No Authority to Ignore Specific and Unambiguous Controlling Laws

The Supremacy Clause of the Constitution dictates that the laws of the United States shall be the supreme law of the land, and that as such all judges are bound to follow them. In recognition of this, the courts have a long tradition of deferring to Congressional statutes, especially when these statutes are expressed in clear, specific, unambiguous and unmistakable language.[13] "It is not the proper function of courts to go behind express terms of statute and, in effect, to disregard them." *In re Universal Money Order Co.*, 470 F.Supp 869 (1977). "The court's function is not to legislate, and where Congress dealt specifically, its enactments should not be tampered with." *Heller v. Smither*, 437 F. Supp 1, affirmed 578 F 2d 1380. Courts "must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain,* 503 U.S. 249, 253-254, 11S. Ct. 1146,1149, 117 L. Ed. 2d 391 (1992).[14]

In the present case, the Ninth Circuit courts have departed radically from the long and established tradition of deferring to specific and unambiguous statutes. By continuing to defy the

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[13] Among others, see *Parts & Elec. Motors, Inc. v Sterling Elec., Inc.* 866 F.2d 228,231-33 (7th Cir. 1988) (employing strict dead reckoning test for clearly erroneous) cert. denied 493 U.S. 847 (1989); *Central Soya Co. v George A. Hormel & Co.*, 723 F 2d1573, 1580 (Fed Cir 1983); *Greene v Massey*, 706 F2d 548,556 (5th Cir. 1983) cert. denied, 464 U.S. 1046 (1984); *Chicago & N.W. Transport. Co. v. United States*, 574 F2d 926,930 (7th Cir. 1978); *Schwartz v NMS Indus. Inc.*, 575 F.2d 553-55 (5th Cir. 1978).

[14] See also *Alabama Power Co. v. Costle*, 636 F.2d 323 (1979); and *US v. Mattson*, 610 F2d 1295.

mandates of Nationality Act Sections 201(e) and 205, the Ninth Circuit courts have once again encroached upon legislative powers.

B. No Determination on the Question of Citizenship Can Be Made Without Considering Sections 201(e) and 205 of the 1940 Nationality Act

The issue of derivative citizenship in this case boils down to a single all-important question: Did petitioner's father, who was born in 1925 in an outlying possession of the United States, receive citizenship from his U.S. citizen mother?

Petitioner has repeatedly asserted that according to Sections 201(e) and 205, his father was in fact born a U.S. citizen. According to Section 201(e) the following person is declared to be a citizen of the United States:

> "A person born in an outlying possession of the United States of parents one of whom is a citizen of the United States who had resided in the United States or one of the outlying possessions prior to the birth of such person"

Section 205, in turn, provides explicitly for Section 201(e)'s retroactivity:

> "The provisions of section 201, subsections (c), (d), (e), and (g)...hereof apply, *as of the date of birth*, to a child born out of wedlock, provided the paternity is established during minority, by legitimation, or adjudication of a competent court. In the absence of such legitimation or adjudication, the child, *whether born before or after the effective date of this Act*, if the mother had the nationality of the United States at the time of the child's birth, and had previously resided in the United States or one of its outlying possessions, shall be held to have acquired at birth her nationality status." (Emphasis added.)

Since petitioner's father was born in an outlying possession of the United States to a citizen mother who had previously resided in an outlying possession, Sections 201(e) and 205 clearly and automatically provide for his U.S. citizenship.

Moreover, because petitioner's citizenship flows directly from his father's citizenship, these provisions of the Nationality Act are indispensable in resolving petitioner's claim of derivative citizenship.

Respondent USCIS' refusal to implement Sections 201(e) and 205 formed the basis, among others, of petitioner's complaint to the district court, and then later to the court of appeals. However, instead of recognizing and upholding the supremacy of Sections 201(e) and 205, the district court refused to acknowledge petitioner's argument that these laws applied to his father's citizenship, and that the respondents' denial of his citizenship claim had no basis in law. More disturbingly, despite petitioners' emphatic plea that the court discuss, or at the very least acknowledge the existence of these laws, the district court defied Congressional mandate by blatantly ignoring them. In its dismissal of the petitioner's case, for example, the district court not only omitted any discussion of Sections 201(e) and 205, but it even insinuated – falsely – that the petitioner's argument for his father's citizenship was based solely upon Rev. Stat. Section 1993. This defiance of Sections 201(e) and 205 was later sanctioned by the court of appeals' summary affirmance.

Petitioners ask this Court to correct these grave abuses by the Ninth Circuit courts. Petitioners wonder why respondents and the Ninth Circuit courts collectively refuse to acknowledge and discuss these laws that are clearly applicable to their case.

C. Section 201(e) of the Nationality Act is Explicitly and Unambiguously Made Retroactive by Section 205 of the Same Act

That Section 201(e) applies to petitioner's father, and that it declares him to be a U.S. citizen, is beyond dispute. The retroactive language contained in Section 205, along with other legislative records, clearly demonstrates that Section 201(e) applies to children born before or after the passage of the 1940 Act. Because of Section 201(e)'s clear retroactivity, no judicial

power in our present dispensation can rule against its application to petitioner's father.

1. This Court has long held that in order to determine whether or not a federal statute is retroactive in application, the courts must first determine whether Congress has expressly prescribed the statute's proper reach. "If the statutory language is unambiguous, in the absence of a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 64 L. Ed. 2d 766, 100 S. Ct. 2051 (1980).[15] This Court has also established a clear standard for retroactive language. In order for Congress to prescribe the temporal reach of a statute, it must be clear that it applies to events that take place *on or after* the enactment of the act. See *Landgraf v. USI Film Products*, 511 U.S. at 259-60, 114 S. Ct. 1483 (1984) (stating that if Congress had intended retroactive application, then "it surely would have used language comparable to . . . 'shall apply to all proceedings pending on or commenced after the date of enactment'")[16]

Given the standard set by this Court in *Landgraf*, the courts below should have acknowledged that Section 201(e) applies to petitioner's father, even if he was born in 1925. By specifying that Section 201(e) would apply "as of the date of birth" to children "born before or after the effective date of this Act," Section 205 provides language that categorically and unquestionably passes any *Landgraf* type of analysis. The courts below should have also acknowledged that petitioner's

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[15] See also *Sutter v. Groen*, 687 F.2d. 197 (1982). "If Congress provides clearly retroactive language, neither the executive nor the judiciary may question the temporal reach of a statute. If Congress lays down flat rule for courts to follow, courts have no right to cut it down to fit their conception of legislative purpose."

[16] This type of language, pertaining to actions or events "before or after" the date of enactment has been used time and again since *Landgraf*. See, for example, *INS v. St. Cyr*, 533 U.S. 289, 318-19, & n.43, 150 L. Ed. 2d 347, 121 S. Ct. 2271, 2289-90& n.43 (2001) ("on or after" the date of enactment); *Martin v. Hadix*, 527 U.S. 343, 354, 119 S. Ct. 1998, 2004, 144 L. Ed. 2d 347 (1999) ("all... proceedings pending on or commenced after the date of enactment").

father was a citizen according to controlling law (Section 201(e)), and that consequently petitioner could not have been disqualified from derivative citizenship on the basis of not having a citizen parent.[17]

2. In addition to clear statutory language, Section 201(e)'s retroactivity is also obvious from legislative records.

a. An early draft of what would later become Sections 201 and 205 of the 1940 Act, submitted by petitioners to the district court and court of appeals in support of their arguments, specifically included the phrase "hereafter born" in reference to the application of Section 201(e).[18] The deliberate removal of the word "hereafter" from later versions of the bill, combined with the Senate's insistence upon the addition of unmistakably retroactive wording, shows that Section 201(e) was meant to be retroactive.[19] If legislative intent had been to make Section 201(e) prospective, then the explicitly prospective language would not have been removed, and the Senate would not have insisted upon retroactive language.

b. Similarly, during the House committee hearings on the proposed 1940 Nationality Act, official representatives from the State and Labor Departments intimated that children born to citizen parents in the outlying possessions (children under the proposed category of 201(e)) were *already* held to be U.S. citizens at that time, and that the new law was simply worded to be a clarification of current practices.[20] This was most clearly

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[17] Indeed, because petitioner's citizenship hinges directly upon his father's citizenship, acknowledgment of Section 201(e)'s impact automatically leads to the conclusion that petitioner himself inherited citizenship at birth under 201(g).

[18] See letter from Asst. Sec. of State William J. Carr to Richard Flournoy, dated March 1, 1933. Records of the Department of State. Record Group 59. Decimal Files, 130-28. National Archives, Washington D.C. (Part of the records submitted to the court of appeals, "Tab 15" in Excerpts of Record).

[19] The phrase "whether born before or after the effective date of this Act" in Section 205 was added at the behest of the Senate in conference committee, so that there would be no argument as to Section 201(e)'s retroactivity. See Conference Report on Nationality Act of 1940. CIS No: 10445 H.rp.3019. Serial Set Collection. H.rp.3019, 76-3. Session date: 1940, 1941.

[20] During those proceedings, the official representative from the Department of State was Richard Flournoy. T.B. Shoemaker (Dep. Commissioner of

demonstrated during the February 20, 1940 testimony of Mr. Richard Flournoy, who was the official discussant on Section 201 of the proposed Nationality Act, and who in fact authored Section 201(e) itself.

> MR. REES. So if the father or mother is a citizen of the United States, then the child is a citizen of the United States, if born in the Philippine Islands or Guam or one of the possessions?
>
> MR. FLOURNOY. That makes it entirely clear. It puts it beyond any shadow of doubt that such a person is a citizen.
>
> MR. CHAIRMAN. Then there is no amendment necessary there?
>
> MR. FLOURNOY. This is just a restatement in clearer language, so that there will be no mistake about it. This statement is clearer than the provision you have now in existing law, section 1993 of the Revised Statutes, as amended.
>
> MR. REES. Is that all about section (e) now?
>
> MR. FLOURNOY. Yes.
>
> MR. REES. Is there anyone here present who wants to comment on section (e) any differently? Now go on to section (f).[21]

Mr. Flournoy also made the same explicit point during the February 12, 1940 Congressional committee proceedings, as shown in the following excerpts:

> MR. FLOURNOY. [reading Section 201(e)] ... That covers the kind of case I mentioned a few moments ago, a child born, say, in American Samoa, of American parents. This makes it clear that even if one parent is a citizen, and he is born in American territory, though not in the United States proper, nevertheless, if he is born in American territory, he acquires citizenship in the United States.

Immigration and Naturalization) and Henry Hazard (Dir. Of Research, Information and Education, Immigration and Naturalization) represented the Department of Labor, and B.W. Butler represented the Department of Justice.

[21] *To Revise and Codify...* page 56.

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MR. POAGE. In other words, notwithstanding that neither of the parents had ever been in continental United States, the child would still be a citizen of the United States.

MR. FLOURNOY. If one of them is a citizen of the United States, who resides in the United States or one of the outlying possessions.

MR. POAGE. Neither parent would have been required to ever have seen the United States.

MR. FLOURNOY. That is right.[22]

Flournoy's testimony, along with the concurrence of all those present, confirms that Congress wanted Section 201(e) to be retroactive. The provision was included so that there would be no confusion as to the citizenship of children who were born to citizen parents in the outlying possessions. Flournoy's testimony further confirms that Section 201(e) simply codified existing practices at the time.

II. The Ninth Circuit's Decision in *Friend v. Reno* Is Clearly Erroneous, Invalid, and Subject to Collateral Attack

A. The *Friend* Decision Defies Congressional Mandate By Substituting Its Interpretation of Revised Statutes Section 1993 In Lieu of the Unambiguously Worded Provisions of Nationality Act Sections 201(e) and 205

In the *Friend* case, the court of appeals examined the citizenship of a child born in the Philippine Islands prior to the passage of the 1940 Nationality Act. The child in question had a U.S. citizen parent who had only resided in those islands prior to the birth of the child.

The central question, according to the *Friend* court, was "whether...residence...in the Philippines qualified as residence "in the United States" under Rev. Stat. § 1993." The court decided that, "Residence in the Philippines during its territorial

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[22] *To Revise and Codify*...page 40.

period does not qualify as residence "in the United States" under Rev. Stat. §1993." The court then concluded that the child in question was not born a citizen of the United States.

The *Friend* decision, however, made a monumental mistake by not first determining whether Sections 201(e) and 205 of the 1940 Nationality Act applied to the child in question. This error is particularly egregious because that same court acknowledged in passing that "under the terms of the 1940 Act, [the child] clearly would be a citizen of the United States because his father had resided in an outlying possession of the United States prior to [his] birth." However, instead of inquiring as to the possibly retroactive scope of Section 201(e), the *Friend* court simply presumed that Section 201(e) was prospective in its application.

As noted earlier, Section 201(e) was explicitly made retroactive by Section 205 of the 1940 Act. With respect to the citizenship of the child in the *Friend* case, then, the court should have applied Sections 201(e) and 205, and should have declared that the child was in fact born a U.S. citizen. Unfortunately, however, instead of applying Section 205, the *Friend* court proceeded to compound its errors by further venturing into an unnecessary – and ultimately erroneous – interpretation of Rev. Stat. Section 1993.

Today, the Ninth Circuit's insistence upon upholding its decision in *Friend* not only results in the continued subversion of Congressional mandate (under Sections 201(e) and 205). The *Friend* decision's unnecessary and erroneous interpretation of the residency requirement under Section 1993 has also continued to result in the unjust denial of rightful U.S. citizenship.

B. The *Friend* Decision Conflicts With Other Statutes, Legislative Records, and Contemporaneous Practices

1. The *Friend* decision ignores, and conflicts with, Sections 201(g) and 201(h) of the 1940 Act.

The *Friend* court's claim that "the 1940 Act itself provides no guidance on the subject" of the residency requirement under

section 1993 is plainly incorrect. Examination of Sections 201(g) and 201(h) of the 1940 Act plainly reveals that the phrase "in the United States or one of its outlying possessions," as used in that Act, was simply a clarification and continuation of the phrase "in the United States" as previously used in Rev. Stat. Section 1993. Specifically, Section 201(h) makes Section 201(g)'s use of the phrase "reside in the United States or one of its outlying possessions" retroactive to 1934.

This retroactive application is significant in at least two respects. First, the 1934 amendment to Rev. Stat. Section 1993 required a child to "reside in the United States" for a period of time in order to retain its citizenship. The residence required of the child under the 1934 amendment ("in the United States") was *exactly the same* as the residence required of the parent for purposes of transmitting citizenship. Thus, the retroactive provision in Section 201(h) reveals that residence by a U.S. citizen in the outlying possessions was equivalent to residence in the United States for the purposes of Section 1993.

Second, and more importantly, the retroactive provision in Section 201(h) shatters the *Friend* court's interpretation that Section 201(e) liberalized the residence requirement for transmission of citizenship under Section 1993. Section 201(h) also shatters the *Friend* court's contention that residency requirements were changed prospectively in 1940.

2. The *Friend* decision completely disregards legislative records on the passage of the 1940 Nationality Act, and it clashes with the contemporaneous practices of the Departments of State, Labor, and Justice.

The *Friend* court's statement that "the legislative history surrounding the 1940 Act's passage is far from conclusive" on the subject of the residency requirement under section 1993 is blatantly false. The 1940 legislative hearings plainly revealed the practices and interpretations of the relevant agencies at the time with regard to Section 1993. Careful examination of these hearings reveal that the *Friend* decision ignored key testimonies, selectively chose fragments from others, and

completely misinterpreted others in order to support its erroneous desired conclusions.

a. The *Friend* decision completely disregards the official position of the Department of State, which was revealed by Richard Flournoy in his Congressional testimony on Section 201(e). As noted above, Flournoy specifically stated that Section 201(e) was simply a clarification and restatement of Section 1993 of the Revised Statutes, at least as it applied to the citizenship of children born in the outlying possessions.

This omission by the *Friend* court is particularly egregious, since citizenship at birth was the exclusive domain of the Department of State prior to 1940. In other words, the Department of State had the final say in the interpretation of Section 1993 of the Revised Statutes, and it was primarily responsible for drafting what would become Section 201 and 205 of the 1940 Act.[23] As such, the testimony of its official representative should have been given highest priority by the *Friend* court in interpreting the residency requirement under Section 1993.

b. The *Friend* decision ignores the testimony of Mr. T.B. Shoemaker, who was the Deputy Commissioner of Immigration and Naturalization (Department of Labor). During the 1940 hearings, Mr. Shoemaker openly agreed with Richard Flournoy that Section 201(e) was just a restatement and clarification of Section 1993. Mr. Shoemaker further stated that the Labor Department had *previously* taken the position that children born under the proposed category of 201(e) were in fact already citizens under Section 1993.[24]

c. The *Friend* decision misrepresents the testimony of Henry Hazard, Director of Research Information and Education for Immigration and Naturalization (Department of Labor). The *Friend* court used a statement by Hazard – that the 1940 Act presented a modification of previous law – to support its flawed

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[23] See Letter from State Department, Passport Division, to Richard Flournoy, dated February 20, 1933. Records of the Department of State. Record Group 59. Decimal Files, 130-26. National Archives, Washington D.C. (Part of the records submitted to the court of appeals.)

[24] Testimony of Mr. Shoemaker, *To Revise and Codify...*, page 56.

conclusion that Section 201(e) was a liberalization of Section 1993. However, a careful reading of Hazard's testimony reveals that he was the official discussant for Sections 301 to 307 of the proposed code, and that he never spoke on the subject of Section 201(e).[25] Moreover, to the extent that Mr. Hazard considered the 1940 Act a modification of previous law, he explicitly claimed that it was *more restrictive* than previous law.[26]

d. During the Congressional hearings on the passage of the 1940 Act, Mr. Henry Butler, the official representative of the Department of Justice, acting on behalf of the Attorney General, officially went on the record and stated that his department thought that the 1940 law was "too harsh and too much a departure from the present law." He even went as far as to accuse the State Department of "running away" with its mandate to codify and revise the nationality laws of the United States.[27] However, during the hearing of the *Friend* case, the Department of Justice reversed its position and falsely represented that the Nationality Act, especially Section 201(e), was a liberalization of the provisions of Section 1993.

The *Friend* court adopted this falsely represented position of the Department of Justice without verifying the original stance of that department during the Congressional hearings in 1940.

e. The *Friend* court gave undue importance to the alleged "concern" of one Congress member, Rep. Poage, during the Congressional hearings, and used this "concern" to support its conclusion that Section 201(e) was a departure from previous practice. However, the *Friend* court disregarded Mr. Flournoy's response to the Congressman's concern, which was that Section 201(e) was just a *clarification* and a *restatement* of Section. Mr. Flournoy even told Rep. Poage that the inclusion

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[25] For Mr. Hazard's testimony on Sections 301 to 307, see *To Revise and Codify*..., beginning on page 63.

[26] See testimony of Mr. Hazard, immediately followed by the testimony of Mr. Flournoy, *To Revise and Codify*..., pages 44-45.

[27] See Mr. Butler's statement, *To Revise and Codify*..., pages 58-59.

of Section 201(e) was an improvement because it was not as lenient as previous law.[28]

Additionally, at another point in the hearings, Rep. Poage and Mr. Shoemaker (from the Labor Department) engaged in a discussion as to why Mr. Shoemaker thought it was necessary to keep certain "liberal" provisions in the proposed law. The *Friend* court may have interpreted this exchange as an indication that Section 201(e) was a liberalization. However, in that same exchange, Poage himself clearly stated that he believed the proposed code to be already more strict than previous law, and that he simply did not agree that it had gone far enough in its restrictions.[29]

C. The *Friend* Decision Suffers From Additional Critical Defects

1. The *Friend* decision committed a grave error when it claimed that the 1940 Act's definition of the term "United States" clarified the term "United States" as it was used earlier in Section 1993. This interpretation defies the explicit warnings of the Nationality Act's authors. In the official report accompanying the draft submitted to Congress, the Departments of State, Labor and Justice warned against applying the 1940 definition of "United States" to previous usages of the term.

> "It is especially important to bear in mind the fact that this definition is "for the purposes of this act" only. It does not purport to follow existing terminology, under which the term "United States" is applied narrowly to the continental United States and the incorporated Territories of

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[28] Statements of Rep. Poage, *To Revise and Codify...*, page 40. It should be also be noted that the Congress members themselves were not nationality experts, and were *not* the authors of the 1940 Nationality Act. Indeed, the reason for the 1940 hearings was for the nationality experts to explain to Congress members like Mr. Poage how the proposed code related to previous provisions of law. See, for example, the comments of Rep. Poage on page 44, as well as the comments of Rep. Rees on page 60.

[29] See *To Revise and Codify..., pages 47-53,* especially comments of Rep. Poage on page 50.

> Alaska and Hawaii, *or broadly to include all territory over which the United States is sovereign.*"[30] (Emphasis added.)

The *Friend* court ignored the fact that there were two different uses of the term "United States" prior to the 1940 Act. It should have realized that the phrase "United States and its outlying possessions" used in Section 201(e) was merely a clarification of the broader definition of "United States" as used earlier in Section 1993.

2. The *Friend* decision was wrong to rely so heavily upon *Rabang vs. INS,* 35 F.3d 1449 (9th Cir. 1994) to guide its interpretation of the residency requirement under Section 1993. *Rabang* and the litany of other cases cited in the *Friend* decision all revolved around the question of citizenship under the 14th Amendment. The *Friend* case should have been distinguished from *Rabang* because the question in *Friend* revolved around a statutory – not Constitutional – claim to citizenship.[31] In short, while *Rabang* dealt with citizenship via *jus soli,* Friend's claim to citizenship was via *jus sanguinis.* Since there was such a deep and fundamental difference between the two claims, the *Friend* court should not have compared the two cases.

3. The *Friend* decision erred by citing and relying upon a 1930 ruling involving a child born in China. The *Friend* court inappropriately cited that ruling because it was erroneous and taken out of historical context.

The *Friend* decision's use of this case is problematic from the start because birth in a foreign country has always been considered different from birth in an outlying territory of the United States. Further, a clear distinction has always been made between those children born of one citizen and one alien

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[30] "Nationality Laws of the United States: .. A report proposing a revision and codification of the nationality laws of the United States...prepared by...the Secretary of State, the Attorney General, and the Secretary of Labor." *House Committee Print,* 76th Congress, 1st Session (Washington: Govt. Printing Office, 1938).

[31] Petitioners in *Rabang* and the other cited cases did *not* have parents who were United States citizens. Rather they claimed to be citizens simply because they were born in the outlying possessions.

parent, and those children born of one citizen and one U.S. national parent.[32]

Moreover, historical records show clearly that in 1933 the State Department formulated an "official" and "correct" interpretation of Rev. Stat. Section 1993 in which residency in an outlying possession of the United States fulfilled the residency requirement for transmission of citizenship. Indeed, this corrected interpretation set the stage for the nationality provisions in the 1940 Nationality Act.[33]

Thus, the *Friend* court's use of *only* the 1930 decision, completely removed from its historical context and without the knowledge that it was later corrected, leads to a highly dangerous, biased and incorrect interpretation of what qualified as "residency in the United States" under Rev. Stat. Section 1993.

D. The *Friend* Decision is Invalid and Subject to Collateral Attack

Given all the above infirmities of the *Friend* decision, and given the fact that it ignores and undermines Sections 201(e) and 205 of the Nationality Act, that ruling by the Ninth Circuit is clearly void and subject to collateral attack. It cannot be used against petitioners' claim of citizenship, which is anchored around clearly worded statute.

The courts have held that judgment must be rendered void when, as in the present case, there has been a clear usurpation of power. See *Coleman v. Court of Appeals, State of Oklahoma*, 550 F.Supp.681 (1980). The courts have also held that void judgments are entitled to no authority or respect and can be impeached at any time, in any proceeding, by anyone with whose interests and rights it conflicts. *Federal Land Bank of St. Louis v. Wilson*, 533 F.Supp.301, affirmed 719 F.2d 1367 (1982). Void judgments may be attacked in any direct or

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[32] See Flournoy's testimony, *To Revise and Codify*, at 39 and 49.

[33] See Letter from State Department, Passport Division, to Richard Flournoy, dated February 20, 1933. See also "The 1940 Nationality Act" by Richard Flournoy.

collateral proceeding where the validity of a judgment is questioned. *Johnston v. Fancher*, 447 F.Supp.509 (1977). *Blume v. U.S. Acting Through Farmers Home Admin.* 40 B.R.551 (1984). In many instances, a judgment is subject to collateral attack if it can be shown that the judgment resulted from the commission of fraud or representation of one of the parties. *Burlington Data v. Automated Medical,* 492 F.Supp.821 (1980).

III. The Ninth Circuit Sanctioned Additional Significant Abuses By the District Court

A. The District Court Ignored Other Legal Issues Raised By Petitioners

1. The district court ignored petitioners' allegation that respondent USCIS' refusal to implement mandatory laws (Sections 201(e) and 205) triggers Constitutional questions regarding infringements upon petitioners' rights to equal protection and due process under the law. In this case, the infringement takes the form of discrimination that is specifically targeted against a particular class of people (parents and their children) who, by law, should be able to transmit or acquire U.S. citizenship under the conditions of Section 201(e). This discrimination becomes even more insidious because, under color of judicial affirmation, respondents have adopted as official policy this stance of ignoring the specific and unambiguous provisions of Section 201(e) and 205.

When discrimination targets people based on class, race, or national origin, the courts have long held that these are per se infringements of equal protection and due process rights. See *Griggs v. Duke Power Company,* 401 US 424 (1971); *Hernandez v. Texas*, 347 US 475 (1954); *Harper v. Virginia Board of Elections*, 383 US 663 (1966); and *Griffin v. Illinois*, 351 US 12 (1956). Moreover, the courts have held that the Fifth Amendment's guarantee against government infringement upon life, liberty, and property are not just limited to citizens,

but also to aliens and other persons who have a strong claim of citizenship. *Y.T. v. Bell*, 478 F. Supp. 828, 832 (1979). Whenever Constitutional issues are raised, as in the above cited cases, courts have always applied the strict scrutiny test to determine if there is a compelling government interest to justify the discrimination.

In the present case, however, there exists no compelling government interest to justify the discrimination against petitioners. Therefore, the Ninth Circuit courts should have seriously considered petitioners' allegations.

2. Petitioners also alleged that a damage suit is permissible if government respondents refuse to carry out its mandatory policy under the "non-discretionary function" exception to 28 U.S.C. § 2680(a). Petitioners argued that they have the right to sue government because the government respondents refused to acknowledge and apply the mandatory provisions of Nationality Act Sections 201(e) and 205.

Petitioners' argument was well founded on case laws. The courts have articulated in numerous cases that the government can indeed be sued when the challenged act or omission violated a mandatory regulation or policy that allowed no judgment or choice. If so, then the discretionary function exception does not apply. See *United States v. Gaubert* 499 U.S. 315, 113 L.Ed. 2d 335, 111 S.Ct. 1267 (1991); *Rosebush v. United States* 119 F.3d 438, 444 (6th Cir. 1997). However, in petitioners' case, the Ninth Circuit courts sidestepped this issue altogether. Instead of resolving the issue of whether government respondents were subject to suit for failure to carry out a mandatory policy (as dictated by the Nationality Act), the courts simply remained silent on the issue.

B. The District Court Committed Several Other Very Significant Errors

The court of appeals' summary affirmance sanctioned the following additional errors of the district court:

1. The district court falsely insinuated that petitioner's argument in support of his father's citizenship was based solely on Revised Statutes Section 1993. As noted above, petitioner's main legal bases for his father's citizenship had always been Sections 201(e) and 205 of the 1940 Nationality Act.

2. The district court indirectly alluded to the 1940 Act in a footnote, but then proceeded to *misquote* the relevant provisions of Section 201(e). In particular, the district court *spliced* and *added* the following phrase into the law:

> "...has had ten years residence in the United States or one of its outlying possessions, at least 5 years of which were after attaining the age of 16 years, provided that the person claiming derivative citizenship also resided in the United States or one of its outlying possessions..."

The district court's inclusion of the phrase above, which comes from Section 201(g), and *not* Section 201(e), of the 1940 Act, is an inexcusable error on the part of the court. It confirms the district court's intentional omission of Section 201(e) from its decision.

3. The district court's claim, that it lacked jurisdiction to hear petitioners' case, relies on a groundless assumption and circuitous reasoning. The court simply claimed that "the records strongly suggest that [petitioners'] claim of U.S. citizenship arose as a direct consequence of their removal proceedings." However, the court gave no additional explanation for such a conclusion. It did not explain why the citizenship arose as a direct consequence of removal proceedings.

Here, the district court simply assumed that the claim of citizenship was caused by an earlier denial of the asylum application. The court's reasoning implies that petitioner's citizenship claim was just a ploy to avoid or delay deportation. This is an unwarranted – and extremely dangerous – assumption because it suggests, without a consideration of relevant facts and laws, that petitioner's citizenship claim is baseless. It sets an unfair and injudicious standard because the court can, at a whim and with a simple dismissive statement, deny jurisdiction

altogether – regardless of the true merits of a citizenship claim. At the same time, however, by dismissing the case on these grounds, the court is *already* passing judgment on the merits of the case, which it is not allowed to do if – as it claims – it lacks jurisdiction in the first place. Furthermore, the district court's "decision" ignored clearly worded controlling statutes (Sections 201(e) and 205). The district court's reasoning is thus circuitous, and by its actions it creates an unfair double standard: on one hand it denied any jurisdiction, and on the other it ruled that the petitioner was not a citizen by virtue of Section 1993.

4. The district court also dismissed, without any reason, petitioners' Motion to Admit Third Amended Petition. The Third Amended Petition alleged new and independent causes of action which were non-frivolous. These included the following allegations: (a) intentional discrimination; (b) respondents' refusal to carry out a mandatory policy as provided in Section 201(e), which falls under the "non-discretionary functions" exception to 28 USCS 2680(a); and (c) respondents' violation of petitioners' right to equal protection, as well as substantive and procedural due process.

The district court abused its discretion when it did not explain why the Motion to Admit Third Amended Petition was being dismissed. The courts have held that any denial of a motion to admit an amended petition requires the court to explain its denial. *La Societe Generale Immobiliere v. Minneapolis Community Dev. Agency* 516 U.S. 810, 116 S. Ct. 58, 133 L. 2d 21 (1995). No such explanation was given by the district court in its dismissal of the Motion to Admit Third Amended Petition.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

JAIME A. FARRALES
MARK J. FARRALES
ANN J. FARRALES
JANE NENA J. FARRALES
Petitioners Pro Se

3350 Wilshire Blvd, Ste. 855
Los Angeles, CA 90010
(213) 738-7004

JUNE 2006

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 05-55536

D.C. No. CV-04001593-CAS
Central District of California, Los Angeles

JAIME A. FARRALES; et al.,
Plaintiffs-Appellants,

v.

US CITIZENSHIP AND IMMIGRATION SERVICES; et al.,
Defendants-Apellees.

Filed: April 04, 2006

ORDER

Before: WALLACE, LEAVY and BERZON, Circuit Judges.

Judge Berzon has voted to deny the petition for rehearing en banc, and Judges Wallace and Leavy have so recommended. *See* Fed. R. App. P. 35(a).

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to hear the matter en banc. *See* Fed. R. App. 35.

The petition for rehearing en banc is denied. No motions for reconsideration, rehearing, clarification, stay of the mandate, or any other submissions shall be filed or entertained in this closed docket.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 05-55536
D.C. No. CV-04001593-CAS

JAIME A. FARRALES;
et al., Plaintiffs-Appellants,

v.

US CITIZENSHIP AND IMMIGRATION SERVICES; et al.,
Defendants-Apellees.

Filed: December 01, 2005

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Christina A. Snyder, District Judge, Presiding

Submitted November 21, 2005**[34]

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: WALLACE, LEAVY AND BERZON, Circuit Judges.

A review of the record and the opening brief indicates that the questions raised in this appeal are so insubstantial as not to require further argument. *See United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (per curiam) (stating standards); *see also Friend v. Reno*, 172 F.3d 638 (9th Cir. 1999).

Accordingly, we grant appellees' motion for summary affirmance of the district court's judgment.

All other pending motions are denied as moot.

AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MINUTE ORDER

Case No.: CV-04-1593 CAS (MANx) March 15, 2005

Title: JAIME A. FARRALES, MARK J. FARRALES, ANN J. FARRALES AND JANE NENA J. FARRALES v. JOHN ASHCROFT, ATTORNEY GENERAL, AND THE UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICE

PRESIDING: HONORABLE CHRISTINA A. SNYDER, U.S. DISTRICT JUDGE

Maynor Galvez, Deputy Clerk

PLAINTIFF COUNSEL PRESENT:
DEFENDANT COUNSEL PRESENT:

PROCEEDINGS: MOTION TO RECONSIDER ORDER DISMISSING THIRD AMENDED PETITION
(filed February 23, 2005)

MOTION TO ADMIT REVISED THIRD AMENDED PETITION
(filed February 23, 2005)

The Court finds these motions appropriate for decision without oral argument. Fed. R. Civ. P. 78; Local Rule 7-15. Accordingly, the hearing date of March 21, 2005, is hereby vacated and the matter is taken under submission.

On February 23, 2005, petitioners Jaime A. Farrales, Mark J. Farrales, Ann J. Farrales, and Jane Nena Farrales filed the above motions requesting the Court to (1) reconsider its order of February 4, 2005, denying petitioners' motion to admit a third amended petition; and (2) admit a revised third amended petition. In light of the Court's March 14, 2005 order dismissing this action, these motions are DENIED.

IT IS SO ORDERED.

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MINUTE ORDER

Case No.: CV-04-1593 CAS (MANx) March 14, 2005

Title: JAIME A. FARRALES, MARK J. FARRALES, ANN J. FARRALES AND JANE NENA J. FARRALES v. JOHN ASHCROFT, ATTORNEY GENERAL, AND THE UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICE

PRESIDING: HONORABLE CHRISTINA A. SNYDER, U.S. DISTRICT JUDGE

Maynor Galvez, Deputy Clerk

PLAINTIFF COUNSEL PRESENT:
DEFENDANT COUNSEL PRESENT:

PROCEEDINGS: **DEFENDANTS' MOTION TO DISMISS** (filed January 20, 2005)

The Court finds this motion appropriate for decision without oral argument. Fed. R. Civ. P. 78; Local Rule 7-15. Accordingly, the hearing date of March 14, 2005, is hereby vacated and the matter is taken under submission.

I. BACKGROUND

On March 10, 2004, petitioners Jaime A. Farrales ("Jaime"), Mark J. Farrales, Ann J. Farrales, and Jane Nena J. Farrales filed a
Petition for Certiorari and Injunction with Mandamus against respondents John Ashcroft in his official capacity as Attorney General of the United States and the United States Citizenship and Immigration Service ("USCIS"), on the ground that the USCIS had abused its authority in denying petitioner Jaime A. Farrales' application for a certificate of United States citizenship. Petitioners assert that they are under an imminent threat of deportation, such that this Court should issue an order enjoining their deportation during the pendency of this action.[1]

On May 4, 2004, petitioners filed a first amended petition requesting a declaration by this Court that Jaime Farrales is a United States citizen. On September 21, 2004, petitioners filed an ex parte application to admit a second amended petition and appearance of additional counsel. The Court denied this application on the ground that petitioners had not served respondents, and ordered petitioners to demonstrate proper service by October 7, 2004. On October 6, 2004, petitioners refilled their motion for leave to admit the second amended petition and appearance of additional counsel, which the Court granted in an order dated December 10, 2004.[2] Petitioners also filed motions for issuance of restraining order and writ of preliminary injunction, which the court denied in an order dated December 28, 2004. On December 21, 2004, petitioners filed a motion to admit a third amended petition. In an order dated February 4, 2005, the Court denied petitioners' motion but granted petitioners twenty days' leave to amend their petition to

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[1] Petitioners are subject to deportation pursuant to a Final Order of Deportation issued by the Board of Immigration Appeals (BIA) following denial of their application for asylum. Petitioners filed a petition for review with the Ninth Circuit, which was dismissed on August 30, 2004. Mot ¶ 10.

[2] Petitioners, however, are currently appearing pro se in this matter.

add a claim against Attorney General Ashcroft under Bivens v. Six Unknown Federal Agents, 403 U.S. 388 (1971).[335]

On January 20, 2005, respondents filed the present motion to dismiss, on the grounds that (1) this Court lacks jurisdiction to consider petitioners' claims; and (2) the petition fails to state a claim for which relief may be granted. In light of its February 4, 2005 order, the Court continued the motion to dismiss until March 14, 2005.[436]

II. STANDARD

A. Rule 12 (b) (1)

A motion to dismiss an action under Federal Rule of Civil Procedure 12 (b) (1) raises the question of the federal court's subject matter jurisdiction over the action. The objection presented by this motion is that the court has no authority to hear and decide the case. This defect may exist despite the formal sufficiency of the allegations in the complaint. See T.B. Harms Co. v. Eliscu, 226 F. Supp. 337, 338 (S.D.N.Y.), aff'd 339 F.2d 823 (2d Cir. 1964) (the formal allegations must yield to the substance of the claim when the a motion is filed to dismiss the complaint for lack of subject matter jurisdiction).

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[3] On February 23, 2005, petitioners filed a motion to disqualify Judge Snyder. The Hon. John Walter was randomly selected to decide the motion, and denied it on March 7, 2005.
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[4] In its February 4 order, the Court declined to admit the proposed third amended petition, which sought to add claims of fraud, misrepresentation, and racial discrimination against respondents, on the grounds that these amendments, as proposed, would be futile. However, the Court held that "to the extent that petitioners are able to allege a colorable violation of their constitutional rights and specific actions by General Ashcroft that he knew or should have known would result in such a violation, petitioners are granted leave to amend accordingly." Order Denying Petitioners' Motion to Admit Third Amended Petition at 5. The Court notes that on February 23, 2005, petitioners filed a motion to admit a revised third amended petition. However, the Court has reviewed the proposed revised petition and finds that it fails to remedy the defects of the prior third amended petition. Accordingly, the operative petition is still the second amended petition.
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When considering a Rule 12(b) (1) motion challenging the substance of jurisdictional allegations, the court is not restricted to the face of the pleadings, but may review any evidence, such as declarations and testimony, to resolve any factual disputes concerning the existence of jurisdictions. See McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988).

The burden of proof on a Rule 12(b) (1) motion is on the party asserting jurisdiction. See Sopcak v. Northern Mountain Helicopter Serv., 52 F.3d 817, 818 (9th Cir. 1995). If jurisdiction is based on a federal question, the pleader must show that he has alleged a claim under federal law and that the claim is not frivolous. See 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure, § 1350, pp. 229-30. On the other hand, if jurisdiction is based on diversity of citizenship, the pleader must show real and complete diversity, and also that his asserted claim exceeds the requisite jurisdiction amount of $75,000. See id.

B. Rule 12 (b) (6)

A Rule 12 (b) (6) motion tests the legal sufficiency of the claims asserted in a complaint. A court must not dismiss a complaint for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 338 (9th Cir. 1996).

In considering a motion pursuant to Fed. R. Civ. P. 12(b) (6), a court must accept as true all material allegations in the complaint, as well as all reasonable inferences to be drawn from them. Pareto v. F.D.I.C., 139 F.3d 696, 699 (9th Cir. 1998). The complaint must be read in the light most favorable to the nonmoving party. Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Circ. 2001); Parks Sch. Of Bus., Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995). Additionally, *pro se* complaints are held to less stringent standards than those drafted by lawyers. Jackson v. Carey, 353 F.3d 750, 757 (9th Cir. 2003) (citing Haines v. Kerner, 404 U.S. 519, 520 (1972) (per curiam). However a court need not accept as true

unreasonable inferences or conclusory legal allegations cast in the form of factual allegations. Sprewell, 266 F.3d at 988; W. Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981).

Dismissal pursuant to Rule 12(b) (6) is proper only where there is either a "lack of cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990).

Furthermore, unless a court converts a Rule 12(b) (6) motion into a motion for summary judgment, a court cannot consider material outside of the complaint (e.g., facts presented in briefs, affidavits, or discovery materials). In re American Cont'l Corp./Lincoln Sav. & Loan Sec. Litig., 102 F.3d 1524, 1537 (9th Cir. 1996), rev'd on other grounds sub nom Lexecon, Inc. v. Milberg Weis Bershad Hynes & Lerach, 523 U.S. 26 (1998). A court may, however, consider exhibits submitted with or alleged in the complaint and matters that may be judicially noticed pursuant to Federal Rule of Evidence 201. In re Silicon Graphics Inc. Sec. Litig., 183 F.3d 970, 986 (9th Cir. 1999); Lee v. City of Los Angeles, 250 F.3d 668, 689 (9th Cir. 2001).

For all of these reasons, it is only under extraordinary circumstances that dismissal is proper under Rule 12(b) (6). United States v. City of Redwood City, 640 F.2d 963, 966 (9th Cir. 1981).

As a general rule, leave to amend a complaint which has been dismissed should be freely granted. Fed. R. Civ. P. 15(a). However, leave to amend may be denied when "the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986); see Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000).

III. DISCUSSION

Respondents argue first that this Court lacks jurisdiction to hear petitioners' claims. Mot. At 1, 4. They assert that Jaime Farrales did not bring his claim for U.S. citizenship until after

deportation proceedings had been initiated against him in 1996 and the denial of his application for asylum by the immigration judge was upheld on appeal. Id. at 2-3.[5] They further assert that pursuant to 8 U.S.C. § 1252, "an alien who has been placed in immigration removal proceedings must seek judicial review of his citizenship claim in the appropriate Court of Appeals by filing a timely petition for review once he receives a final administrative order." Id. at 4.[6] Accordingly, respondents contend that Jaime's claim for citizenship can only be asserted before the Ninth Circuit in a petition for review under § 1252 (b) (5). Id. at 7-8. Respondents further argue that even assuming arguendo that this Court had jurisdiction to hear the petition, petitioners cannot establish a viable claim that Farrales has a right to derivative citizenship, or that any of the actions allegedly committed by respondents constituted violations of due process that prejudiced petitioners, for reasons set forth in the Court's December 28, 2004 order denying petitioners' motion for preliminary injunction. Id. at 8-14.

Petitioners respond that because the Court's denial of their motion for preliminary injunction is currently on appeal, defendants' motion cannot be heard and "no further action can be taken by this court until after the termination of the issue appealed from." Opp. at 1-2.[7] Petitioners also dispute defendants' characterization of the facts surrounding their application for asylum, asserting that they applied for asylum shortly after arrival in the United States in 1990. Id. at 5.

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[5] Respondents note that petitioners conceded their deportability at their hearing before the immigration judge on June 25, 1996. Id. at 2; Exh. 4 (hearing transcript).

[6] While respondents acknowledge that an individual seeking a determination of United States citizenship may bring an action for such determination in federal district court does not have jurisdiction "(1) where the issue of such person's nationality arose by reason of or in connection with any removal proceeding under the INA [Immigration and Nationality Act]; or (2) where the issue of such person's nationality is in issue in any removal proceeding under the INA." Mot. at 5 (citing 8 U.S.C. § 1503).

[7] Petitioners, however, are incorrect. An appeal from an interlocutory order, pursuant to 28 U.S.C. § 1292(a) (1), does not divest the district court of jurisdiction to continue with other phases of the case. See DePinto v. Provident Sec. Life Ins. Co., 274 F.2d 50, 51 n.2 (9th Cir. 1967).

While they do not dispute that this application was denied by the immigration judge, and that this denial was upheld by both the BIA and the Ninth Circuit, they appear to argue that their claim for citizenship does not fall under § 1252 because their order for deportation did not become legally effective until after the Ninth Circuit's Affirmance. As to the merits of their claim, petitioners essentially reiterate the arguments advanced in their motion for preliminary injunction.

The Court finds dismissal is appropriate. First, this Court lacks jurisdiction to hear petitioners' claim. Despite petitioners' assertions to the contrary, the record strongly suggests that their claim to U.S. citizenship arose as a direct consequence of their removal proceedings. As such, judicial review of the claim, upon exhaustion of all available administrative remedies, falls exclusively within the jurisdiction of the court of Appeals, pursuant to 8 U.S.C. §§ 1252 and 1503(a).[8] See Taniguchi v. Schultz, 303 F.3d 950, 956 (9th Cir. 2002); Chau v. INS, 247 F.3d 1026, 1028 n.2 (9th Cir. 2001). It appears that the Court therefore has no jurisdiction over this action under Fed. R. Civ. P. 12(b)(1).[9]

Furthermore, even assuming arguendo that the Court had jurisdiction, the petition fails to state a claim for which relief may be granted. As discussed in the Court's December 28, 2004 order denying petitioners' motion for preliminary injunction, the Ninth Circuit has already dealt with the exact legal issue raised by petitioners in their second amended

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[8] The Ninth Circuit, in its August 30, 2004 opinion upholding he BIA's denial of petitioners' asylum application, stated that it did not have jurisdiction to review the final order of removal of petitioners because according to the record before I, the appeal of Jaime Farrales' application for citizenship was still pending and he therefore had not exhausted all available administrative remedies. See Mot., Exh. 5 (Farrales v. Ashcroft, 108 Fed. Appx. 507, 508-09 (9th Cir. 2004)).

[9] Petitioners also claim that specific actions by USCIS in connection with its denial of Jaime's application for citizenship violated his due process rights. See 2nd Amended Pet. §§ 38.1-38.4 and discussion infra. However, given that the Court lacks jurisdiction over petitioner's citizenship claim, it would also appear to lack jurisdiction over any due process claims related to the prosecution of the citizenship application.

petition. In Friend v. Reno, 172 F.3d 638 (9th Cir. 1999), the Appellee claimed derivative U.S. citizenship under section 1993 of the Revised Statutes of 1878, based on the fact that his father was a U.S. citizen who had never left the Philippines before the appellee's birth. Friend, 172 F.3d at 641.[10]

Here, the facts are almost precisely analogous to those of Friend. Jaime Farrales asserts that his father, Ricardo Farrales, who was born in the Philippines and lived there his entire life, derived U.S. citizenship from Lily McGuire, who was Ricardo's mother and Jaime's grandmother.[11] For purposes of reviewing Jaime's citizenship application, the Administrative Appeals Office ("AAO") accepted his assertion that Lily McGuire was a U.S. citizen by derivative citizenship, although she was born and spent her entire life in the Philippines. See Mot., Exh.7 (AAO decision). Nevertheless, as the AAO pointed out, Friend makes clear that Ricardo Farrales was not a U.S. citizen because Lily McGuire's residence in the Philippines did not satisfy section 1993's requirement that the parent of the person claiming citizenship must have been a U.S. citizen who had resided "in the United States" prior to the claimant's birth. Petitioners argue chiefly that the later Nationality Act of 1940 ("the 1940 Act"), under which residence in the Philippines would have satisfied the residency requirement for the derivative citizenship, was a clarification rather than a modification of section 1993, and therefore applicable to Ricardo Farrales.[12] However, this argument was considered and rejected in Friend. See Friend, 172 F.3d at 643.

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[10] As discussed in greater detail in the Court's December 28, 2004 order, Section 1993 has since been superseded by subsequent statutes. However, a person's citizenship is governed by the law that was in effect at the time of his or her birth. Section 1993 provided that a person not born within the jurisdictional limits of the United States could derive U.S. citizenship from a parent who was a U.S. citizen, but only if that parent had resided in the United States.

[11] Jaime reasons that he, in turn, derived U.S. citizenship from his father. The Court need not reach that issue, however, since the threshold question is whether Ricardo Farrales was in fact a U.S. citizen under section 1993.

[12] The 1940 Act granted derivative U.S. citizenship to any person whose parent was a U.S. citizen who, prior to the birth of that person, had lived at

Even if petitioners were correct in stating that the Friend court misinterpreted the relationship between section 1993 and the 1940 Act, neither this Court nor the USCIS has any authority to contravene a clear rule established by the Ninth Circuit – namely, that residence in the Philippines does not constitute residence in the United States under section 1993. Under this rule, Lily McGuire never resided in the United States, and Ricardo Farrales therefore did not derive U.S. citizenship from her. It follows that Jaime Farrales could not have derived U.S. citizenship from him.

As to petitioners' claims that respondent USCIS violated Jaime Farrales's due process rights in its denial of his application for citizenship, petitioners, as discussed in the December 28, 2004 order, have failed to establish how any of the alleged actions would have affected the ultimate outcome of his application.[13] Even accepting all petitioners' allegations as true and drawing all inferences in their favor, the Court finds that there is no cognizable legal theory under which it could grant any of them U.S. citizenship. Accordingly, this action should be dismissed pursuant to Fed. R. Civ. P. 12(b) (6).

IV. CONCLUSION

For the reasons set forth above, defendants' motion to dismiss is GRANTED.

IT IS SO ORDERED.

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least ten years "in the United States or one of its outlying possessions," provided that the person claiming derivative citizenship had also resided in the U.S. or one of its outlying possessions for at least five years between the ages of 13 and 21. 54 Stat 1139 (emphasis added).

[13] Petitioners allege that USCIS (1) falsely represented, in its decision, that Jaime received an interview in connection with his application, when in fact he did not; (2) misdirected him regarding the proper filing procedure for his appeal; (3) falsely informed the Ninth Circuit that he had abandoned his claim to citizenship; and (4) did not send copies of its appeal brief to petitioners' counsel. 2nd Amended Pet. ¶¶ 38.1-38.4.

APPENDIX E

U.S. CITIZENSHIP AND IMMIGRATION SERVICES
[ADMINISTRATIVE APPEALS OFFICE]

RICARDO JAIME ADOR FARRALES
8834 BURNET AVENUE, UNIT #18
NORTH HILLS, CA 91343

FILE: A70 035 239 Office: LOS ANGELES, CA

IN RE: Applicant: RICARDO JAIME ADOR FARRALES

APPLICATION: Application for Certificate of Citizenship under Section 201(g) of the Nationality Act of 1940; 8 U.S.C. (1940 Ed.) § 601(g)

ON BEHALF OF PETITIONER:

NATHAN V. HOFFMAN
3350 WILSHIRE BLVD. #855
LOS ANGELES, CA 90010

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wieamnn, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the Interim District Director, Los Angeles, California, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant was born on April 19, 1947, in the Philippines. The record reflects that the applicant's mother, Cristina Ador, was born in the Philippines, and was not a United States (U.S.) citizen. The applicant's father, Ricardo McGuire Farrales, was born on February 7, 1925, in the Philippines. The applicant's parents married on July 10, 1946, in the Philippines. The applicant seeks a certificate of citizenship under section 201(g) of the Nationality Act of 1940 (the Nationality Act); 8 U.S.C. § 601(g), based on the claim that his father is a derivative U.S. citizen and that he derived U.S. citizenship at birth through his father.

The interim district director determined that the applicant failed to establish that either of his parents were U.S. citizens at the time of his birth. The interim district director concluded that the applicant therefore did not qualify for a certificate of citizenship pursuant to section 201(g) of the Nationality Act, and the application was denied accordingly.

On appeal counsel asserts that the interim district director's decision was legally and procedurally flawed. Counsel asserts that pursuant to Section 1993 of the Revised Statutes of the United States of 1878 (section 1993 of the Revised Statutes), the applicant's father (Mr. Farrales) derived U.S. citizenship through his mother (Flora "Lily" de Mayo) who was born in the Philippines on May 12, 1902. counsel asserts that Flora "Lily" de Mayo derived U.S. citizenship through her father (James McGuire) who was born in Ontario Canada on March 6, 1876, and who resided in the U.S. for many years and became a naturalized U.S. citizen in the 1880s. In addition, counsel asserts that the Service violated the applicant's procedural due process right by being unprepared and unfamiliar with the applicant's case during his citizenship interview and by failing

to schedule a second interview for the applicant prior to rendering a decision in his case.

The AAO is not persuaded by counsel's assertion that the applicant's procedural due process rights were violated. The record reflects that the applicant was afforded a citizenship application interview. The record additionally reflects that the evidence and legal arguments submitted and made by the applicant and counsel were reviewed and taken into consideration in the interim district director's decision. Moreover, the record reflects that the interim district director's decision referred to and applied relevant citizenship statutory and legal case law to the applicant's case. The AAO therefore does not find that the applicant's procedural due process rights were violated or that the applicant was deprived of a fair and impartial citizenship interview.

"The applicable law for transmitting citizenship to a child born abroad when one parent is a U.S. citizen is the statute that was in effect at the time of the child's birth." *Chau v. Immigration and Naturalization Service,* 247 F.3d 1026,1029 (9th Cir., 2000) (citations omitted). The applicant was born on April 19, 1947. Section 201(g) of the Nationality Act is therefore applicable to his derivative citizenship claim. In order for a child born outside the United States to derive citizenship from one U.S. citizen parent pursuant to section 201(g) of the Nationality Act, it must be established that, when the child was born, the U.S. citizen parent resided in the U.S. or its outlying possession for 10 years, at leats 5 of which were after the age of 16. *See* § 201(g) of the Nationality Act.

Counsel asserts on appeal that the applicant's father (Mr. Farrales) derived U.S. citizenship through his mother (Flora "Lily" de Mayo) and that Flora "Lily" de Mayo's and Mr. Farrales' residence in the Philippines during the years that the Philippines were a possession of the U.S. qualified as residence in the United States for section 1993 Revised Statutes, derivative citizenship purposes.

Section 1993 of the Revised Statutes, which applies to children born abroad to U.S. citizens prior to May 24, 1934, states that:

> All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their births citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States.

The Immigration and Nationality Technical Corrections Act of 1994 amended section 1993 of the Revised Statutes to allow children born outside of the jurisdiction of the United States to also derive U.S. citizenship through U.S. citizen mothers who had resided in the United States.

Counsel asserts that the applicant's grandmother (Flora "Lily" de Mayo) was born in the Philippines to U.S. citizen parents, and that her father, James McGuire, previously resided in the United States. Counsel asserts that Flora "Lily" de Mayo therefore derived U.S. citizenship pursuant to section 1993 of the Revised Statutes.

The record reflects that James McGuire was a naturalized U.S. citizen and that he resided in the U.S. for many years. The AAO notes, however, that the record does not contain a marriage certificate to indicate that James McGuire and Gregoria Tejero married in 1902. The record also does not contain Flora "Lily" de Mayo's birth certificate. In their stead, counsel submits, as exhibit B, an original and translated document stating that:

> The girl Flora [partially blotted out] MacGuire has been legitimized [?] by the subsequent marriage between Mr. [?] [illegible] MacGuire and Gregoria Tejero.

> [illegible words]
> On the twenty-second [?] of May, nineteen hundred two. I, the undersigned Parish pastor [illegible word] of this town of [illegible words] of our Lady of Borongan [illegible words]
> [illegible signature]

Exhibit B additionally includes an original and translated Baptismal document stating in pertinent part that:

> On the twenty-ninth day of the month of May, nineteen hundred two, I, the Undersigned Parish pastor...solemnly baptized...a girl who was born on the twelfth of February, one thousand [illegible word] year [illegible word] at ten in the evening, who has been named Flora de Mayo...is the first natural daughter of M g[?] [illegible word] and of Gregoria Tejero, indigenous to this town...

The AAO notes its concerns regarding the probative value of the Exhibit B documents. However, because the issue of whether Flora "Lily" de Mayo was a legitimated child of James McGuire for derivative citizenship purposes is ultimately not determinative in the present case, the AAO will accept the exhibit B documents as evidence that Flora "Lily" de Mayo was the legitimated child of James McGuire, and as evidence that she was therefore a U.S. citizen at birth pursuant to section 1993 of the Revised Statutes. *See Matter of K-W-S,* 9 I&N Dec. 396, 402 (BIA1961).

The AAO notes that based on the evidence contained in the record, Flora "Lily" de Mayo resided in the Philippines for her entire life. Counsel asserts that pursuant to section 201 of the Nationality Act, residence in an outlying possession of the United States qualifies as residence for derivative citizenship purposes. *See* section 201(g) of the Nationality Act (stating that in order to derive citizenship from a U.S. citizen parent, a child born outside the United States must establish that the parent

resided in the U.S. or its outlying possessions.) Counsel asserts further that, although section 1993 of the Revised Statutes itself does not mention or address the issue of outlying possessions, Congressional history and records relating to the passage of the Nationality Act of 1940 nevertheless make it clear that section 1993 of the Revised Statutes inherently included in its definition of "residence in the United States" a citizen's residence in an outlying possession. Counsel asserts that rather than viewing the outlying possession language in section 201(g) of the Nationality Act as a change or modification to residence requirements for U.S. citizen parents, the language should be viewed as a clarification or restatement of existing policy under section 1993 of the Revised Statutes. In support of his assertion, counsel submits numerous pages of congressional records and testimony relating to the passage of the Nationality Act.

The AAO finds counsel's assertion that the definition of "United States" for section 1993 residence requirements purposes include residence in outlying possessions of the U.S. to be contrary to precedent setting Ninth Circuit Court of Appeals legal decisions on the issue. Moreover, although not mentioned on appeal, counsel acknowledges in footnote 16 of his original application brief, that the Ninth Circuit Court of Appeals squarely addressed the outlying possession and residence issues raised in the present appeal, in its 1999 decision, *Friend v. Reno*, 172 F.3d 638 (9th Cir. 1999).

Like the issue presently before the AAO, the issue on appeal in *Friend v. Reno*, was whether residence in the Philippines qualified as residence in the United States for derivative U.S. citizenship purposes. The Ninth Circuit Court of Appeals clarified in *Friend* that "[t]he Fourteenth Amendment provides in relevant part that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." *Friend* at 641. The Ninth Circuit Court of Appeals noted that "[s]ection 1993 [of the Revised Statutes] itself

provides no clear definition of the term "United States," and no cases have expressly addressed this ambiguity" and that, "[t]his lack of a clear definition is not surprising given the fact that, at the time of section 1993's original enactment in 1855, the United States had yet to annex unincorporated territories such as the Philippines." *Id.* Quoting from a previous Ninth Circuit Court of Appeals decision, *Rabang v. Immigration & Naturalization Service,* 35 F.3d 1449, 1452 (9th Cir. 1994), the Ninth Circuit then reiterated its holding that, "birth in the Philippines during the territorial period does not constitute birth in the United States under the Citizenship Clause of the Fourteenth Amendment, and thus does not give rise to United States citizenship." *Id.* (internal quotations and citations omitted).

The Ninth Circuit Court of Appeals noted in *Friend v. Reno*, that section 201(e) of the Nationality Act:

> [R]eplaced part of Rev. Stat. § 1993, and stated that a citizen of the United States could transfer his or her citizenship to a child born in an "outlying possession" of the United States if that parent had "resided" in the United States or one of its outlying possessions prior to the birth of such person.

Friend, supra, at 643. However, after reviewing and analyzing congressional and legislative records relating to the passage of the Nationality Act of 1940, the Ninth Circuit Court of Appeals concluded that the legislative history surrounding the passage of the Nationality Act was of little assistance in interpreting section 1993 of the Revised Statutes, and that any guidance from the legislative history of the Nationality Act supported a finding that the 1940 Act represented a modification of the prior law on residence in the United States rather than a clarification or restatement of the prior law. *See Friend* at 643. Accordingly, **the Ninth Circuit Circuit Court of Appeals concluded that the definition "United States" for section 1993 Revised Statutes purposes did not include an outlying**

possession such as the Philippines. *Id.* at 648. The Ninth Circuit Court of Appeals concluded further that, **"[r]esidence in the Philippines during its territorial period does not qualify as residence "in the United States" under Rev. Stat. § 1993."** *Id.* at 648. [Emphasis added].

In an effort to persuade the Immigration and Naturalization Service (Service, now Citizenship and Immigration Services, CIS) not to apply the precedent setting Ninth Circuit Court of Appeals *Friend* decision to the applicant's case, counsel asserts in footnote 16 of his original brief, his opinion that the Ninth Circuit Court of Appeals misread congressional and legislative history, grossly misapplied the law, and erroneously concluded that the Nationality Act of 1940 was a modification of prior law rather than a clarification or restatement of section 1993 of the Revised Statutes' policy.

The AAO notes first that the present application arises within the jurisdiction of the Ninth Circuit Court of Appeals. The AAO notes further that, "[i]t is undisputed that a federal agency is obligated to follow United States circuit court precedent in applicable cases originating within that circuit" and that "[a] decision by a [circuit court], not overruled by the United States Supreme Court, is...binding on all inferior courts and litigants in the [circuit], and also on administrative agencies." *See Matter of Jesus Enrique Rodriguez Tejedor*, 23 I&N Dec. 153, (BA 2001) (internal citations and quotations omitted). The AAO finds that it is therefore bound by the Ninth Circuit Court of Appeals, *Friend v. Reno,* holding that "[r]esidence in the Philippince during its territorial period does not qualify as residence in the United States under Rev. Stat § 1993." *Friend*, supra at 648.[37]

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[37] The AAO notes that, even if the applicant's case did not fall within the jurisdiction of the Ninth Circuit Court of Appeals, the matter is additionally controlled by the Board of Immigration Appeals decision, *Matter of Hermosa,* 14 I&N Dec. 447 (BIA 1973) by which the AAO is also bound. *See* 8 C.F.R. § 3.1(g). *Matter of Hermosa* clearly states that the Philippine

8 C.F.R. 341.2(c) states that the burden of proof shall be on the claimant to establish the claimed citizenship by a preponderance of the evidence. The applicant in this case has not met the burden of establishing that his grandmother, Flora "Lily" de Mayo resided in the United States as required under section 1993 of the Revised Statutes. The applicant thus failed to establish that his father, Jaime McGuire Farrales derived U.S. citizenship status through Flora "Lily" de Mayo. The applicant therefore does not qualify for consideration for citizenship purposes under section 201 of the Nationality Act and the appeal will be dismissed.

ORDER: The appeal is dismissed.

Islands are not deemed to be part of the United States for purposes of the citizenship clause of the Fourteenth Amendment.

APPENDIX F

Department of Homeland Security
U.S. Citizenship and Immigration Services

300 North Los Angeles Street
Los Angeles, CA 90012

Refer to File Number: A070 035 239
Date: October 1, 2003
Prepared by J.M. Howland, DAO

Ricardo Jaime Ador Farrales
8834 Burnet Avenue, Unit #18
North Hills, CA 91343

DECISION

Reference is made to the Application for Certificate of Citizneship, Form N-600, that you filed with this office on May 28, 2003, allegedly pursuant to Section 201(g) of the Nationality Act of October 14, (NA), as amended. The citizenship of a person born outside of the United States is determined by the statutes and law in existence at the time of the person's birth. Section 201(g) NA was in effect on April 19, 1947, the date when the applicant was born in Borongan, Eastern Samar, Philippines to Ricardo McGuire Farrales and Cristina Ador Farrales, then both Philippine nationals and citizens.

Section 201(g) NA 1940 states: in pertinent part: "*The following shall be nationals and citizens of the United States at birth... (g) A person born outside the United States and its outlying possessions of parents one of whom is a citizen of the United States who prior to the birth of such person, has had ten years'*

residence in the United States or one of its outlying possessions, at least five of which were after attaining the age of sixteen years, the other being an alien; Provided That in order to retain such citizenship, the child must reside in the United States or its outlying possessions for a period or periods totaling five years between the ages of thirteen and twenty-one years: Provided further. That, if the child has not taken up a residence in the United States or its outlying possessions by the time he reaches the age of sixteen years, or if he resides abroad for such a time that it becomes impossible for him to complete the five years' residence in the United States or its outlying possessions before reaching the age of twenty-one years, his American citizenship shall thereupon cease."

A review of the Service record shows that allegedly the applicant's father, Ricardo McGuire Farrales was born on February 7, 1925 in the Philippine Islands which was then an outlying possession of the United States. Allegedly, his parents were "Lily May" McGuire and Teofilo Farrales, both citizens of the United States.

Allegedly, his mother, Flora de Mayo, ("Lily May"), McGuire, was born in the Philippine Islands in 1902 to a naturalized citizen father James McGuire. Allegedly, her mother, Gregoria Tejero, was born a national of the United States who became a United States citizen upon her marriage to James McGuire in 1902. Allegedly, their daughter, "Lily May," the mother of Ricardo McGuire Farrales became a citizen at birth through the action of Section 1993, Revised Statutes of the United States of 1878 which stated, "*All children, heretofore or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may bet at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States.*" [Emphasis added.]

Allegedly, Mr. McGuire had resided in the United States prior to the birth of his daughter, unlike "Lily May" McGuire who

never resided in the United States prior to the birth of Ricardo McGuire Farrales in 1925. His 1925 birth also fell under the purview of the 1993 Revised Statutes of the United States 1878. The Service has determined that both of the applicant's parents were former nationals of the United States at the time of your birth in 1947. Prior to July 4, 1946, the applicant's parents were considered to be US nationals, but not citizens of the United States. The distinction between citizens and nationals is clearly set forth in section 101(a) (22) of the INA which provides: "*The term 'national of the united States' means (A) a citizen of the United States, or (B) a person, who, though not a citizen of the United States, owes permanent allegiance to the United States.*" A national of the United States may acquire United States citizenship through the naturalization process. Your parents once were nationals of the United States residing in the Philippines (which was a US possession from 1898 until 1946). "*Under Presidential Proclamation 2695 of July 4, 1946 (11 F.R. 7515) the United States withdrew and surrendered all rights of sovereignty over the territory and people of the Philippines. At that moment, the allegiance which the citizens of the Philippine Islands owed to the United States, was terminated and the corresponding United States nationality of such persosn was likewise terminated.*" (See Matter of M – Board of Immigration Appeals, June 30, 1954). At the time of the applicant's birth in 1947, both of your parents were nationals and citizens of the Philippines. You did not establish *how* you meet all of the eligibility requirements of Section 201(g) NA, 1940, because at the time of your birth in 1947 you did not have at least one US citizen parent.

You also provided some evidence and argument that the Philippines was deemed to be a part of the United States prior to 1925. The Service does not find your evidence and argument compelling.

The Philippine Islands have never been deemed to be a part of the United States within the purview of the 14th Amendment. "The term "United States" when used in a geographic sense

means the continental United States, Alaska, Hawaii, Puerto Rico, and the Virgin Islands of the United States." [Matter of Hermosa, Interim Decision 2231, BIA 1973]. (Emphasis added.)

"*Congress provided for the eventual independence of this possession. The Philippine Independence Act, effective May 1, 1934, stated that 'citizens of the Philippine Islands who are not citizens of the United States shall be considered as if they were aliens' for the purpose of immigration, exclusion, and expulsion under the Immigration Act of 1917 and 1924. Filipinos retained U.S. nationality, yet were deemed aliens for the purposes ascribed above. Upon independence on July 4, 1946, those Philippine nationals who were not U.S. citizens became aliens for all purposes, thus losing every aspect of their U.S. nationality.*" [See Matter of Hermosa, Interim Decision 2231, BIA 1973].

Historically, Congress had declined to confer US citizenship on citizens of the Philippine Islands. "*Congress has never conferred citizenship upon the inhabitants of the Philippine Islands. While a person born in the US loses the citizenship acquired thereby only if he commits expatriating acts, this is not true of an U.S. national who does not possess citizenship but merely owes allegiance to the U.S. All citizens of the Philippine Islands who had not acquired US citizenship lost their US nationality on July 4, 1946, whether residing in the Philippine Islands or in the US.*" [Matter of Hermosa, ID 2231, BIA 1973].

Based on a review of the Service record and the evidence and testimony you provided during the examination of your application, the Service has determined that you are ineligible for the issuance of a Certificate of Citizenship. You did not establish by any US law or statute that either one of your parents (who were nationals but not citizens of the United States prior to July 4, 1946), ever was a citizen of the United States at the teim of your birth in the Philippines in 1947. Therefore, you

did not establish that you have fulfilled all of the conditions for eligibility under Section 201(g) NA 1940, or under any other section of this Act. Accordingly, your Application for a Certificate of Citizenship must be and hereby is DENIED.

You may appeal this decision. You then must submit such an appeal to THIS OFFICE with a filing fee of $110.00. If you do not file an appeal within the time allowed, this decision is final. Appeal in your case may be made to:

[ ] The Board of Immigration Appeals, (Board), in Falls Church, Virginia. It must reach this office within 15 calendar days from the date this notice is served, (18 days, if this notice is mailed).

[XX] The Administrative Appeals Unit, (AAU), in Washington, D.C. It must reach this office within 30 calendar days from the date this notice is served, (33 days, if this notice is mailed).

DO NOT send your appeal directly to the Board or to the AAU. Please direct any questions you may have to the Citizenship and Immigration Service office nearest your residence.

Sincerely,

Jane E. Arrellano
Interim District Director (Services)
Signed for by J.M. Howland, DAO

Copy:

Enclosure: Form I-290(B) "Notice of Appeal to the AAU"

Form I-290(B) (rev. 04-01-01)